

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LASHAWN TERRY)	
Claimant)	
VS.)	
)	
LIFE CARE CENTER OF ANDOVER)	Docket No. 1,066,149
Respondent)	
AND)	
)	
OLD REPUBLIC INSURANCE CO.)	
Insurance Carrier)	

LASHAWN TERRY)	
Claimant)	
VS.)	
)	
RL MAIZE COURT 2, LLC)	Docket No. 1,066,150
Respondent)	
AND)	
)	
DIAMOND INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent, RL Maize Court 2, LLC, requests review of the November 14, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

APPEARANCES

Jonathan Voegeli, of Wichita, Kansas, appeared for the claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent, RL Maize Court 2, LLC, and its insurance carrier. Brandon A. Lawson, of Kansas City, Missouri, appeared for respondent, Life Care Center of Andover and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopts the same stipulations and has considered the same record as did the ALJ, consisting of the transcript of the November 14, 2013, preliminary hearing with exhibits attached; the transcript of the deposition of Susie Engels taken September 24, 2013; and the documents of record filed with the Division of Workers Compensation.

ISSUES

The ALJ found claimant was injured arising out of and in the course her employment on July 5, 2013, and assessed benefits against RL Maize Court 2, LLC, (Reflection Living) and ordered respondent to furnish the names of two physicians from which claimant was to select one for treatment.

Reflection Living, and its insurance carrier Old Republic Insurance, request review of the ALJ's Order arguing claimant's November 9, 2011, workplace accident with Life Care Center of Andover (Life Care) is the prevailing factor for her current complaints and that her July 5, 2013, incident with Reflection Living merely caused an aggravation of a preexisting condition. Therefore, claimant did not sustain an accident on July 5, 2013, and the ALJ's Order should be reversed.

Life Care and its insurance carrier, Diamond Insurance, argue claimant's injury on November 9, 2011, is not the prevailing factor in her current condition and need for treatment.

Claimant maintains she has sustained her burden of proof establishing she suffered an accidental injury on either November 9, 2011, or July 5, 2013. Claimant asks the Board to determine which injury is the prevailing factor in her need for treatment and order either or both respondents to provide treatment for her full range of symptoms.

FINDINGS OF FACT

Claimant worked for Life Care as a CNA. Her duties included assisting the residents with their daily living activities, including feeding, lifting, showering and toilet assistance.

Claimant suffered injury to her low back on two separate occasions, the first on November 9, 2011, while in the employment of Life Care, and the second on July 5, 2013, while in the employment of Reflection Living. The first accident occurred as claimant and a co-worker were assisting a resident to stand up to go to supper. Claimant felt a pain in her lower back as she was lifting the resident.

As a result of the November 9, 2011, incident claimant was diagnosed with a lower lumbar strain. Claimant was unable to bend or stand up straight and was in continual pain. Claimant was sent to the Kansas Medical Center Emergency Room where she was treated by Dr. Wilkinson. An MRI on January 5, 2012, indicated a herniated disk at L5-S1, toward the left side. There was no evidence of encroachment. She received physical therapy, muscle relaxers and pain medication. Claimant was able to obtain relief from this course of treatment.

Claimant later came under the care of John P. Estivo, D.O., who, after an examination, on January 30, 2012, diagnosed an asymptomatic herniated disk at L5-S1. Claimant reported no symptoms at the time of this examination. She denied any pain in her lower extremities in 2011. Dr. Estivo determined claimant was at maximum medical improvement and was completely intact neurologically. Dr. Estivo recommended no additional medical treatment and no restrictions for the November 9, 2011 accident. According to the AMA Guides¹ claimant had a 0 percent impairment for that injury. Claimant testified that, after January 2012 when Dr. Estivo released her with no rating for her first accident, she had no symptoms in her back.

Claimant voluntarily resigned her position with Life Care in February 2012. She worked for another care facility for six months and then went to work for Reflection Living at the end of August 2012. Claimant testified she informed Reflection Living of her prior back injury.

Claimant suffered the second accident on July 5, 2013, as she was helping a co-worker put a resident into bed. Claimant initially felt only tension in her back, but soon realized she could not bend down. She indicated the injury in her back on July 5, 2013, was different from the one in November 2011 because she experienced shooting pain from her back through her buttocks and into her lower extremities. She testified that the 2011 injury was completely resolved when she suffered the injury in 2013.

Claimant testified that, after her July 5, 2013, accident she was not able to leave right away and had to finish her shift, so she did as much light work as she could and then went home. When she woke the next day, she could barely move and went to the emergency room with shooting pain from her back through her buttocks and into her legs. This was the first time she had experienced pain in her low back since her November 2011 injury. Claimant continues to experience this pain. She testified that she has essentially not received any treatment for the injury from the July 5, 2013, accident.

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

Claimant was sent to Dr. Estivo for evaluation after both injuries. At the first evaluation, on January 30, 2012, Dr. Estivo opined claimant was completely asymptomatic and had denied lumbar spine pain or lower extremity symptoms. He felt claimant was at maximum medical improvement in relation to the November 9, 2011, injury. He did not feel she was in need of any future medical treatment in relation to the injury claim. He assigned a 0 percent impairment and recommend claimant continue with her physical therapy exercise on her own.

Dr. Estivo again examined claimant on September 12, 2013, and opined claimant had suffered an aggravation her preexisting herniated disk at L5-S1, related to the injury claim of November 9, 2011. Dr. Estivo's history indicates no specific traumatic event preceding the problems with claimant being unable to bend over. However, claimant's testimony describes an event where she felt tension in her back as she and a co-worker placed a resident into bed. Directly before this incident, claimant had been able to bend with no problem.

Dr. Estivo noted claimant was two months pregnant and complaining of left leg pain on a daily basis, which he felt was consistent with a herniated disk at L5-S1. He went on to find that the prevailing factor for claimant's current problems was the accident on November 9, 2011. He was unable to get another MRI or x-ray because claimant was pregnant. He recommended physical therapy, and for claimant to limit lifting to no more than 20 pounds, and no constant bending or twisting was allowed.

Claimant's last day of employment with Reflection Living was September 2, 2013. Claimant's apartment complex burned down and she lost everything. She was not able to work and was terminated. Claimant has not worked since being terminated and has not had any treatment. She was receiving unemployment before Reflection Living appealed and now she is not receiving any benefits.

Pam Hall, executive director for Life Care Center of Andover, reviewed claimant's paperwork and confirmed claimant voluntarily resigned her position from Life Care. She also testified that had claimant not resigned, her restrictions would have been accommodated. If, however, she were looking to be hired, she would not be hired under her then current restrictions.

Susie Engels, co-owner of Reflection Living, testified the business was started in 2006 with four other individuals. One of those individuals, Jennifer Maul, shares the day to day managing duties with Ms. Engels. Neither makes a decision without consulting the other first. Ms. Engels testified that she was not aware of claimant's prior low back problems.

Ms. Engels testified claimant began working for the facility on August 6, 2012, in the Maize Court 2 house, as a CMA. Claimant worked the night shift, 7:00 p.m. to 7:00 a.m.

Ms. Engels attests that, at the time of claimant's hiring, she was physically able to perform every job duty of a CMA at the facility. Claimant continued to perform her work satisfactorily until her termination. Claimant did have one write up in her file for not showing up to work for three days in late August 2013, due to an apartment fire. When claimant asked for time off work because of the fire, she failed to mention she was not able to get into her apartment to get to any of her things and to assess any damage until that Friday. Ms. Engels denied the request because it was a holiday weekend and the request was last minute. She claims it had nothing to do with her not believing there was a fire. It was more that it was a holiday weekend and there were already others that had the weekend off. They would be shorthanded if claimant did not come in. Ms. Engels testified that if claimant had notified her sooner about the fire and needing time off she might have been able to do something, but last minute was simply not possible.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(a)(b)(c) states:

- (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
- (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
- (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(d)

- (d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f)(1)(2)

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

- (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
- (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
- (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2012 Supp. 44-508(f)(3)(A)

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

- (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
- (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of

employment, if the employee is a provider of emergency services responding to an emergency.

(C) The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

K.S.A. 2012 Supp. 44-508(g)

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The ALJ determined the prevailing factor opinion of Dr. Estivo was misguided. This Board Member agrees. Claimant was asymptomatic after the initial examination on January 30, 2012. She was given no restrictions and no functional impairment. Claimant also testified that she was symptom free with no limitations on her job duties. Additionally, claimant worked for respondent Life Care after her treatment ended, worked for another employer for about 6 months and then went to work for Reflection Living, performing her duties for almost one year before suffering the second accident.

It is significant that the injury appears to have been in the same area of the back. Both times Dr. Estivo diagnosed L5-S1 degeneration with a herniated disk. However, after the first accident claimant fully recovered and at no time suffered radiculopathy into her legs. The second accident appears to have made her condition significantly worse, with greater pain, and more extensive symptoms.

Dr. Estivo seemed to find it significant that claimant suffered no traumatic event before the second pain sequence. However, claimant testified to experiencing tension in her back just before she was unable to bend. While not a sudden onset of significant pain, it did present with an unusual symptom at the time of the second accident.

This Board Member finds claimant's condition at the time of the second accident worsened claimant's disk herniation and created pressure on claimant's spine. This is a more serious condition than claimant experienced from the first accident. The accident on July 5, 2013, was more than an aggravation of claimant's preexisting condition. The accident actually resulted in a change in the physical structure of claimant's body. The Order of the ALJ assigning the responsibility for claimant's current need for medical treatment to Reflection Living is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant suffered personal injury by accident on July 5, 2013, while working for respondent Reflection Living. The award of benefits against that respondent is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated November 14, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

HONORABLE GARY M. KORTE
BOARD MEMBER

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John D. Clark, Administrative Law Judge

² K.S.A. 2012 Supp. 44-534a.